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August 27, 2014

**VIA E-MAIL & FEDERAL EXPRESS**

Marvin Benton, Assistant Regional Counsel  
United States Environmental Protection Agency, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, Texas 75202-2733

Re: Wilcox Oil Superfund Site, Bristow, Creek County, Oklahoma

Dear Mr. Benton:

As counsel for BNSF Railway Company (BNSF/Company), I write to respond to EPA's July 28, 2014 invitation to BNSF to negotiate an Administrative Order on Consent (AOC) pursuant to which BNSF would fund or perform a Remedial Investigation and Feasibility Study (RI/FS), and reimburse EPA's costs, concerning the referenced Wilcox Oil Superfund Site in Bristow, Oklahoma. This response is timely pursuant to the Agency's August 18, 2014 letter extending the due date to today.

As its record in this EPA Region and others demonstrates, BNSF takes its environmental responsibilities seriously. The Company participates in EPA's SmartWay Transport Partnership program and is a rail-industry leader in reducing carbon-dioxide and particulate-matter emissions. It is also an industry leader in its efforts to recycle used materials such railroad ties, lube oil, and batteries. In the past five years, the Company has invested over \$315 million in site-remediation efforts. And it has recently been honored with several environmental awards,

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including the Botanical Research Institute of Texas's 2013 Regional Award of Excellence for Sustainability in Business and BREATHE LA's 2013 Innovation Breath of Life Award. BNSF places a paramount importance on environmental stewardship.

In the time allowed by the Agency for this response, the Company has carefully reviewed the information EPA provided concerning the Company's association with the Site, information the Company has been able to locate in its files, and relevant legal authority to determine if that association is sufficient to conclude that BNSF is a potentially responsible party (PRP) at the Site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

EPA provided information that it said is an example showing evidence that BNSF "owned, operated, or leased " the Site. That information concerns a 1917 deed from the Continental Refining Company to a predecessor in interest of BNSF (the St. Louis-San Francisco Railway Company)<sup>1</sup> for a strip of land approximately 50-feet wide that is contained within the area now defined as the Site. Pursuant to the terms of the deed, that strip—together with an adjoining strip that was conveyed by a nearly identical deed executed the same day—was conveyed on the condition that it be used by BNSF as a railroad right-of-way (ROW). At one time the combined strip of land was used as a ROW for a spur (Spur) abutting the main line (Main Line) that runs through the Site. BNSF's property interest in the land underlying the Spur ended in 1937, and the Spur no longer exists.

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<sup>1</sup> Although BNSF is a successor in interest with respect to certain property rights at the Site, it does not concede that it is a successor in interest with respect to any alleged CERCLA liability.

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With respect to the Main Line, BNSF (through an earlier predecessor) acquired its property interest through an 1896 Act of Congress. *See* Act of Mar. 18, 1896, ch. 60, 29 Stat. 69. That Act gave BNSF a 100-foot-wide ROW that was in the nature of an easement rather than a fee interest. *See Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1264-68 (2014) (noting that railroad ROWs granted under post-1871 statutes were generally in the nature of an easement); *Great N. Ry. Co. v. United States*, 315 U.S. 262, 277-79 (1942); *Energy Transp. Sys., Inc. v. Kan. City S. Ry. Co.*, 1981 OK 159, ¶¶ 19-21, 638 P.2d 459, 463. BNSF's interest in the Main Line ended in 1998 when it conveyed the ROW to the Oklahoma Department of Transportation.

Neither the information provided by the Agency nor BNSF's review of its records provide any indication that BNSF is potentially liable under section 107(a) of CERCLA, 42 U.S.C. § 9607(a) based on its status as an "owner" at the Site.

In order to impose CERCLA liability based on a person's ownership of real property, hazardous substances must have been disposed of on that property at the time of that person's ownership. *See* 42 U.S.C. § 9607(a)(2) (defining as a PRP "any person who *at the time of disposal* of any hazardous substance owned . . . any facility *at which such hazardous substances were disposed of*" (emphasis added)); *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 451-52 (9th Cir. 2011) (holding that CERCLA owner liability applies to "the passive *title* owner of real property who acquiesces in another's discharge of harmful pollutants on his real property or pollutes the land himself").

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Assuming for the sake of argument that BNSF qualifies as a past “owner” of the land underlying the Spur and the Main Line, we have seen no evidence that any hazardous substances were disposed of on these two narrow strips of land during the time of BNSF’s interest in them. For example, the Agency’s July 28, 2014 letter identifies several sources of Site contamination, including a waste pit, waste and settling ponds, and a number of tank bottoms. EPA Letter, Enclosure 1 (Background). Nothing demonstrates that any of these alleged sources of hazardous substances was deposited on either of these two narrow strips of land.

Moreover, it is doubtful that BNSF is an “owner” to begin with. A railroad ROW in the nature of an easement is not a sufficient property interest to give rise to owner liability under CERCLA. *Redevelopment Agency of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 679-80 (9th Cir. 2011); *see San Pedro Boat Works*, 635 F.3d at 444 (holding that easement holders are not CERCLA “owners”); *Long Beach Unified School Dist. v. Godwin Cal. Living Trust*, 32 F.3d 1364, 1368-70 (9th Cir. 1994) (same).


In addition, EPA has provided nothing to show that BNSF’s operations on the Main Line or the Spur implicate the Company as a liable “operator” under section 107(a), and the Company knows of nothing.

Therefore, in the absence of information showing that BNSF is a potentially responsible party under CERCLA, the Company respectfully declines the Agency’s invitation to negotiate an AOC to perform an RI/FS and reimburse the Agency for its costs at this Site. Please let me know if you have more information that the Company should consider, or if you think we have

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missed something in the law or relevant facts. If you would like to discuss this response, please let me know.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John N. Hanson". The signature is stylized with a large "J" and "H".

John N. Hanson

cc: Russell J. Light, BNSF (via e-mail)